SUPREME COURT, U. S.

JUN 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 299

BORDEN CABINET CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1966.

No. .....

BORDEN CABINET CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Borden Cabinet Corporation (hereinafter called "Petitioner") prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board against the Petitioner.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board entered June 24, 1966 (R. 71 to 75), are reported at 159 N. L. R. B. No. 99. The opinion of the United States Court of Appeals for the Seventh Circuit entered April 12, 1967 (Appendix A, *infra*, pp. 13 to 19) is reported at ..... F. 2d .....

JURISDICTION.

The judgment and decree of the United States Court of Appeals for the Seventh Circuit was entered on May 1, 1967 (Appendix A, *infra*, pp. 13 to 19). The jurisdiction of this Court is invoked under 62 *Stat.* 928 (28 U. S. C. Sec. 1254(1) and under 61 *Stat.* 136, as amended (29 U. S. C. Sec. 160(e)).

QUESTION PRESENTED.

Whether Petitioner had a duty to recognize and bargain with the Union[1] on May 24, 1965, under Section 8(a)(5) of the Act, after the Union had asserted that a majority of Petitioner's employees had signed union authorization cards, even though the Union had been rejected by a majority of Petitioner's employees in a Board conducted election held on March 5, 1965, and the question as to the validity of that election was still unresolved at the time the Union demanded recognition.

FEDERAL STATUTES INVOLVED.

The primary statutory provisions involved are Sections 8(a)(5), 9(c)(1) and 9(c)(3) of the Labor Management Relations Act (hereinafter called the "Act"). 61 *Stat.* 136, as amended (29 U. S. C. Sec. 158(a)(5), 159(c)(1) and 159(c)(3)). All pertinent parts of the Act appear in Appendix B, *infra*, pp. 20 to 21.

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1. International Union of District 50, United Mine Workers of America.

STATEMENT.

On the 5th day of March, 1965, the Union was rejected by Petitioner's employees in a Board conducted election (R. pp. 52-53 and p. 77). Immediately thereafter, the Union began campaigning among Petitioner's employees, attempting to persuade a majority of its employees to sign union authorization cards. The union cards introduced before the Trial Examiner all bear dates between March 5 and May 20, 1965 (R. p. 65 and pp. 79-87). On May 20, 1965, the Union alleged that a majority of Petitioner's employees had signed union authorization cards and so stated in a letter addressed to Petitioner dated May 20, 1965 (R. pp. 65-66 and p. 88). Petitioner answered the Union's demand for recognition by letter dated May 24, 1965, and stated, in essence, that it could not recognize the Union since it had been rejected by a majority of Petitioner's employees in the election held approximately one and one-half months prior to May 20, 1965 (R. pp. 66 and 90).

It stands uncontradicted in the record that at the time Petitioner refused to recognize and bargain with the Union, the results of the election held on March 5, 1965, had not been determined with finality; objections to that election filed by the Union were still pending (R. p. 66).

The decision and order of the Board was rendered on June 24, 1966. In this decision and order the Board found that Petitioner's refusal to recognize and bargain with the Union on May 24, 1965, was violative of Section 8(a)(5) of the Act and ordered Petitioner to bargain with the Union on request. A chronological statement of the proceedings resulting in this order and decision follows.

On June 30, 1965, General Counsel filed its consolidated complaint charging violation of Section 7, Section 8(a)(1) and Section 8(a)(5) of the Act. Rhetorical paragraph 8

of said complaint asserted that at all times since May 5, 1965, the Union had been the exclusive collective bargaining representative of Petitioner's employees, and rhetorical paragraph 10 alleged that Petitioner had at all times since May 20, 1965, refused to bargain collectively with the Union for the purpose of undermining the Union's majority status. It is the finding with respect to these allegations which is herein challenged.

On March 9, 1966, the Trial Examiner issued his decision in the above proceedings, finding that Petitioner had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, and recommending further that the election held on March 5, 1965, be set aside and a new election held. The Trial Examiner also found that Petitioner had not engaged in certain other unfair labor practices and recommended that those allegations of the complaint be dismissed. Thereafter, General Counsel filed limited exceptions to the Trial Examiner's decision, one of which challenged the Trial Examiner's finding that Petitioner did not violate Section 8(a)(5) of the Act by refusing on May 24, 1966, to recognize or bargain with the Union. As noted above, this portion of the Trial Examiner's decision was then modified by the Board in its decision and order rendered on June 24, 1966. The Board overruled the Trial Examiner's order that another election be held and ordered Petitioner to recognize the Union as the collective bargaining representative of its employees.

On April 12, 1967, the Seventh Circuit Court enforced the order of the Board holding, in essence, that Section 9(c)(3) of the Act did not relieve Petitioner of its duty to recognize and bargain with the Union pending a determination as to the validity of the March 5, 1965, election.

REASONS FOR GRANTING THE WRIT.

1. In the case at bar, the Seventh Circuit has decided a federal question of labor law not heretobefore determined by this Court or expressly presented to any federal court outside of the Seventh Circuit which involves a new interpretation of Section 9(c)(3) of the Act and which will undoubtedly have a tremendous impact on labor relations throughout the country.[2] This petition has been filed not because of a conflict within the circuits—though one is very likely to arise—but because the Seventh Circuit has nullified the congressional intent of Section 9(c)(3) and has created a novel bargaining duty on the part of employers. Under these circumstances, this Court should render a decision accepting or rejecting the Seventh Circuit's conclusion so that the legislative branch of our government can immediately decide whether or not Section 9(c)(3) should be amended.

The Seventh Circuit's decision herein is similar to and is based in large measure on its recent decision in *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d 173 (7th Cir., 1966). Quite frankly, this Court recently denied certiorari in the *Conren* case, ... U. S. ..... (35 Law Week 3329). However, because of Petitioner's sincere and honest belief that a decision by this Court on the question herein presented is of manifest importance, this petition has been filed despite the recent action in *Conren*. Perhaps the *Conren* petition did not make clear the implications of the Seventh Circuit's interpretation of Section 9(c)(3). Furtheremore, this case serves to illustrate the immediate effect of the *Conren* doctrine on other employers in different circumstances.

In its *Conren* decision, the Seventh Circuit held that

2. Section 9(c)(3) provides: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."

Section 9(c)(3) of the Act, which provides for a one year period between elections, does not relieve an employer of his duty to recognize a union which has established a majority by the use of authorization cards under Section 8(a)(5) of the Act, even though a valid election has been held within the preceding year.

In the present case, the Seventh Circuit has held that an employer is required to recognize a union which has allegedly established a majority through authorization cards approximately one and one-half months after it has been rejected in an election and while objections to that election are pending at the time of the demand. Pursuant to the *Conren* doctrine, the ultimate outcome of the election is of no consequence, since an election does not bar a union from demanding recognition on the basis of cards. The Seventh Circuit has, in effect, authorized a union to participate in an election and, if it loses, to secure a majority by the use of cards immediately thereafter. The *Conren* doctrine has been taken one step further in the case at bar to the point where it is now unlawful for an employer to even await the outcome of an election before granting or refusing to grant recognition on the basis of cards.

It is, of course, not the purpose of this petition to extensively argue the case on the merits; nevertheless, the theory underlying the Seventh Circuit's decision must be briefly referred to in order to fully comprehend the inauspicious consequences that court's decision will have on the industrial stability aspect of labor relations. In determining that Section 9(c)(3) of the Act did not relieve Petitioner of its duty to bargain with the Union, even though requested to do so while objections to an election in which the Union had been rejected were pending, the Seventh Circuit simply relied upon the *Conren* decision in support of its interpretation of Section 9(c)(3). The Court's major premise in *Conren* is that the one-year rule of

Section 9(c)(3) is confined to elections only, not to authorization cards, and that it would be a usurpation of a legislative prerogative to limit the use of authorization cards to conform to Section 9(c)(3) of the Act. Petitionr respectfully disagrees.

Under the Wagner Act, the Board was authorized to hold secret ballot elections or to "utilize any other suitable method" of determining employee desires as to union representation when a question of representation existed. *Section 9(c) National Labor Relations Act.* In addition to secret elections, the principal method used by the Board under the Wagner Act was the so-called cross-check of the signature on union authorization cards against an employer's payroll. But the Labor Management Relations Act permits the Board to resolve representation cases only by secret ballot election. In other words, as the Act now stands the Board is directed to conduct an election when a "question of representation exists." *Section 9(c)(1) Labor Management Relations Act.* The language of the Wagner Act authorizing the use of "any other suitable method" was omitted from Section 9(c) when the law was amended. Representation proceedings under the Act refer to elections and nothing more, and it is only elections which are regulated by the Act. Petitioner respectfully submits that the learned Seventh Circuit erred when it concluded that the language of Section 9(c) indicated, ". . . that Congress was aware of the alternative methods of establishing . . . union representative status, but . . . concerned itself only with limiting the frequency of Board . . . conducted elections. . . ." *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d at 174 (7th Cir., 1966).

Certainly Congress confined the language of Section 9(c)(3) to elections, because the election process is the only representation proceeding regulated under Section 9(c) of the Act after its 1948 amendment, and Petitioner

earnestly submits that the right of the judiciary to regulate the use of cards so as not to conflict with the policy of Section 9(c)(3) can be established if given the opportunity to argue the case on the merits.

The Seventh Circuit's decision in the case at bar presents a totally new concept relative to organizational drives. To Petitioner's knowledge, no case has been reported since the 1948 amendment to the Act in which a union has attempted to circumvent the purpose and policy of Section 9(c)(3) as was done in the instant case until 1966, when the *Conren* decision was reported. A complete lack of union activity in this regard indicates an assumption by labor as well as management that the prohibition of Section 9(c)(3) would likewise be applied to authorization card campaigns.

If allowed to become established precedent, the immediate ramifications of the Seventh Circuit's decision are easily and dramatically foreseeable, as the following, few examples illustrate:

(1) Even though accepted as being a secondary and less reliable means of determining the desire of employees for union representation, the use of authorization cards is encouraged over the election process by being allowed when an election would be prohibited.

(2) The entire election process will become pointless since a rejected union can begin a card campaign and demand recognition immediately after any election.

(3) What happens when a union, rejected in an election, demands recognition two weeks thereafter on the basis of cards but the employer has a legitimate good faith doubt that the union represents a majority? Ordinarily an election would be directed; but under these circumstances another election could not be held for one year by virtue of 9(c)(3) and the parties come to an absurd impasse.

(4) A double standard is created among management and labor, to-wit: management being bound for one year by an election while labor is not.

(5) Industrial stability—the primary reason behind the enactment of Section 9(c)(3)—is destroyed with endless card campaigns every time a union is rejected in an election.

The above examples plainly reveal the complete state of confusion which will no doubt result from the Seventh Circuit's decision, and as the late Justice Robert Jackson once remarked, "Chaos serves no social end."[3] Petitioner submits that these future consequences of the instant decision magnify the urgent necessity for a decision by this Court on the merits.

2. Having in mind the fourth and fifth examples set out above, Petitioner calls this Court's attention to its decision in *Brooks* v. *N. L. R. B.*, 348 U. S. 96, 103 (1954). Admittedly, the specific holding in the case at bar is not in direct conflict with *Brooks;* however, the Seventh Circuit's decision is certainly at odds with the rationale underlying this Court's decision in *Brooks.*

A union was certified as the result of an election in *Brooks.* One week after the election the company received a petition from a majority of its employees to the effect that the employees did not desire union representation. This Court held that the union must be recognized as the employees' representative for a period of one year after the election, notwithstanding the petition of the employees. The heart of the Court's reasoning, as expressed by Justice Frankfurter, was:

"* * * The underlying purpose of this statute is in-

3. Justice Jackson's dissenting opinion in *State Tax Comm. of Utah* v. *Aldrich,* 316 U. S. 174, 185 at page 196. Though the case is unrelated to that before the Court, Justice Jackson's succinct but accurate observation is particularly apposite.

> dustrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of electrons, with a view of furthering industrial stability and with due regard to administrative prudence."

The Seventh Circuit's opinion undermines the stated purpose of Section 9(c)(3). It is inconceivable that there can now be industrial stability if a rejected union is allowed to begin a card campaign immediately after an election and demand recognition on the basis of cards thus obtained one and one-half months after the election and while objections to that election are still unresolved.

CONCLUSION.

Petitioner respectfully submits that a decision by this Court on the novel question presented is needed to specifically determine what effect Section 9(c)(3) of the Act has on union authorization card campaigns and to eliminate the confusion which has been and will continue to be created by the Seventh Circuit's decision in this regard. A decision by this Court affirming or overruling the Seventh Circuit's unique decision is required not only for the benefit of the many employers who will be affected by the flood of card campaigns which, most assuredly, will be forthcoming once the Seventh Circuit's interpretation of 9(c)(3) is circulated, but also to enable Congress to utilize a Supreme Court decision on this very important question to determine whether an amendment to the Act is necessary. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 15775 SEPTEMBER TERM 1966—APRIL SESSION 1967

BORDEN CABINET CORPORATION, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

April 12, 1967.

Before DUFFY, *Senior Circuit Judge,* SWYGERT and FAIRCHILD, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* Petitioner seeks to review and set aside an order of the National Labor Relations Board issued against it on June 24, 1966, and reported at 159 N.L.R.B. No. 99. In its answer, the Board has requested that its order be enforced in full.

The Board found that in order to defeat the Union in a representation election, the Company coercively interrogated and threatened its employees in violation of Section 8 (a)(1) of the National Labor Relations Act. The Board's order directs Borden to cease and desist from the unfair labor practices found. Affirmatively, Borden is required to bargain with the Union upon request and to post the customary notices.

In view of the absence of Company exceptions, there is no dispute before us as to the unfair labor practices found by the Board except for the Board's determination that the Company's refusal to bargain was a violation of Section 8(a)(5) of the Act.

The record establishes that a Board-conducted election was held on November 20, 1963, and that the Union lost this election. However, that election was set aside and a new election was ordered September 14, 1964, when the Board found that the Company had sought to discourage unionization by illegally threatening and interrogating employees and by discharging six employees because of their union sympathies.

The second election was scheduled to be held March 5, 1965. The Board found that shortly before that date, the Company again engaged in illegal interrogation of employees and made implied threats of reprisals. Furthermore, three days before the date of the election, the Company posted a notice that employees' hospital benefits under the employees' group insurance, would be increased. The Board found the Company timed this announcement so as to interfere with the employees' freedom of choice in the election.

Immediately after losing the second election by nine votes, the Union started to obtain authorization cards signed by Company employees. By May 20, 1965, 138 employees out of 248 in an admittedly appropriate unit signed up with the Union. This fact was communicated to the Company by a letter dated May 20, 1965. The Union offered to submit its authorizations for an impartial check, and requested a meeting for the purpose of negotiating a contract. The Company refused stating the Union's request was untimely. The Union filed a charge alleging a refusal to bargain. The proceedings on that charge were consolidated with the proceedings

arising out of the employer's alleged pre-election misconduct.

On March 9, 1966, the Trial Examiner found that Borden had engaged in certain unfair labor practices and recommended that the election which had been held on March 5, 1965 be set aside and that a new election be held.

The Board overruled the Trial Examiner's determination that another election should be held. It dismissed the petition for an election and ordered petitioner to recognize the Union as the collective bargaining representative of the employees. The Board found that the Company's refusal to recognize and bargain with the Union was in bad faith and not because of any good-faith doubt of the Union's majority.

The Board's order and decision stated:

> "The foregoing unfair labor practices, considered in the light of Respondent's earlier history of union animus and unfair labor practices, convince us, and we find, that Respondent's overall conduct evinced a rejection of the collective-bargaining principle and that its refusal on May 24, 1965, to recognize and bargain with the Union was in bad faith and not because of a good-faith doubt of the Union's majority."

A Board-conducted election under Section 9 is not the exclusive means by which a Union's majority status may be established. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-72.

When a Union has obtained authorization cards signed by a majority of the employees in an appropriate unit, the employer violates Section 8 (a)(5) if, absent a good-faith doubt of the Union's majority status, the employer refuses to recognize and bargain with the Union. *National Labor Relations Board* v. *Frantz and Company*, 7 Cir.,

361 F. 2d 180, 182; *National Labor Relations Board* v. *Storack Corporation*, 7 Cir., 357 F. 2d 893, 895.

Here, the Company never challenged the validity of the cards obtained by the Union between March 6 and May 20, nor did it express doubt that the cards had been signed by a majority of the unit employees. But the Company vigorously insists that it was acting in good faith because Section 9(c)(3) of the Act relieved it of its duty to recognize and bargain with the Union.[1]

Our decision in the instant case depends to a considerable degree as to the application or non-application of a recent decision of this Court, to-wit: *Conren, Inc.* v. *National Labor Relations Board*, 368 F. 2d 173 (October 1966). In *Conren*, there was a dissent in part by Judge Kiley. However, a petition for a rehearing en banc was denied by this Court. The United States Supreme Court thereafter denied a petition for certiorari, ... U. S. ..... (35 Law Week 3328).

In *Conren*, we stated (page 174):

> "One of the principal issues this proceeding presents for our determination is whether the fact that the Union's demand for recognition and the commencement of contract negotiations, which Conren ignored, was made within less than one year—actually some nine months and sixteen days—after a valid Board conducted representation election in which the employees of the unit involved rejected both the Union and another labor organization (Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 144) in favor of 'no union' precluded the existence of any duty on the part of the Conren to recognize and bargain with the Union."

In another portion of the *Conren* opinion, page 175, we stated the issue raised was "... whether an employer is

1. Section 9(c)(3) provides—"No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."

required to recognize and bargain with a union within a year following a valid election on the basis of a showing of authorization cards executed by a majority of the employees."

In *Conren,* we decreed that the Board's order be enforced. Following the language of *Conren,* we held the employer was required to recognize and bargain with the Union within a year following a valid election on the basis of the showing of authorization cards executed by a majority of the employees.

In the case at bar, we have an election that was found to be invalid by reason of proscribed conduct on the part of the employer. The decision in *Conren, Inc.* v. *N. L. R. B., supra,* is the law of this Circuit. We must apply that law.

In the instant case, the Company has been found to have destroyed two elections as a reliable test of the Union's strength. There is substantial basis in the record before us for the Board's finding that the Company did not refuse to recognize the Union merely because the Union had received less than a majority in the second election, but rather, was motivated by a desire to frustrate the employees' right to organize and bargain collectively.

Under these circumstances, it was proper for the Board to order the Company to recognize and bargain with the Union rather than ordering that still another election be held. *National Labor Relations Board* v. *Frantz and Company, supra,* at 183; *Irving Air Chute Company* v. *National Labor Relations Board,* 2 Cir., 350 F. 2d 176, 182.

The petition of Borden to set aside the order of the Board entered on June 24, 1966, is denied.

The petition of the National Labor Relations Board that said order be enforced is granted.

ORDER ENFORCED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

BORDEN CABINET CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 15775.

DECREE.

May 1, 1967.

Before: DUFFY, *Senior Circuit Judge,* SWYGERT, and FAIRCHILD, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of Borden Cabinet Corporation, to review and set aside a certain order of the National Labor Relations Board issued against petitioner, on June 24, 1966, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 21, 1967, and has considered the briefs and the transcript of record filed in this cause. On April 12, 1967, the Court, being fully advised in the premises, handed down its decision denying the Petition for review and enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that

Borden Cabinet Corporation, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ F. Ryan Duffy,
Senior Judge, United States Court of Appeals for the Seventh Circuit,

/s/ Luther M. Swygert,
Judge, United States Court of Appeals for the Seventh Circuit,

/s/ Thomas E. Fairchild,
Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:
Teste:
Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

Those portions of the Labor Management Relations Act of 1947, as amended, cited in the Petition read as follows:

SEC. 8(a)(5): "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

SEC. 9(c)(1): "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

SEC. 9(c)(3): "(3) No election shall be directed in any bargaining unit or any subdivision within which,

in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

APPENDIX C.

Section 9(c) of the National Labor Relations Act reads as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceedings under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 299

BORDEN CABINET CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-17) is reported at 375 F. 2d 891. The Board's decision and order (J.A. 50-75)[1] are reported at 159 NLRB No. 99.

JURISDICTION

The decision of the court of appeals was rendered on April 12, 1967, and a decree was entered on May

[1] "J.A." refers to the Joint Appendix filed in the court below.

1, 1967 (Pet. App. 13, 18). The petition for a writ of certiorari was filed on June 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 29 U.S.C. 160(e).

QUESTION PRESENTED

The Board set aside a representation election (which the union had lost) because of the employer's unfair labor practices, and ordered a new election. The employer committed further unfair labor practices before the second election, which the union again lost and which the Board again set aside. After the second election but before the Board had invalidated it, the union obtained authorization cards from a majority of the employees. The question presented is whether the employer, who did not question the authorization cards, violated the National Labor Relations Act by refusing to bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the Petition, pp. 20-21.

STATEMENT

A. The Board's findings of fact

On November 20, 1963, pursuant to a petition filed by the International Union of District 50, United Mine Workers of America, the Board conducted a representation election to determine whether the em-

ployees of the petitioner ("Borden") desired the Union as their bargaining representative. The Union lost the election, but the Board set it aside, finding that prior to the election the Company had threatened and discharged numerous employees for engaging in union activities, in violation of Section 8(a)(3) and (1) of the Act. (J.A. 72; *Borden Cabinet Corp.*, 148 NLRB 996.)[2] The Board scheduled a second election for March 5, 1965 (J.A. 72, 52-53; 4).

Several days before the second election, Company Production Manager Fromme approached employee Herman Miller, whose wife had just returned to work from a layoff, and said, "Herman your wife is back to work now * * * how does she feel about the election * * *." When Miller replied that that was her "personal opinion," Fromme stated, "[W]ell, she is back to work now * * * we are having an election coming up in a few days * * * we need every vote we can get * * * tell her to think twice before she votes * * *." (J.A. 72, 53; 14-15.) About the same time, Foreman Seger asked Carol Rockey, one of the employees whom the Company had unlawfully discharged prior to the 1963 election (*supra*), whether her union views had been changed by General Manager Korff's recent anti-union speech. She replied negatively. Shortly thereafter, Production Manager Fromme asked Rockey the same question

[2] The Board subsequently determined that the Company also violated Section 8(a)(4), (3), and (1) of the Act by denying reinstatement to two employees for having testified adversely to the Company in the administrative proceedings relating to the validity of the election (J.A. 72; 61 LRRM 1368).

and, when she gave the same response, he said: "I have nothing against you or your work but I have a job to protect." Korff himself then asked Rockey whether her union views had changed, and, upon receiving a negative reply, declared that he did not want any campaigning during working hours and that he could "get a couple of affidavits saying" Rockey had been engaged in such activity. Korff added that Rockey's work had been better since the Board had ordered her reinstatement, and then stated: "I can't say that for some of the other [reinstated employees] but * * * the [Board's] cease and desist order wouldn't last forever." (J.A. 72-73, 54-55; 3-9.)

Three days before the second election, the Company announced to the employees that there would be substantial increases in their insurance coverage in about six weeks (J.A. 73; 56-57; 33, 39, 41, 84). The day before the election, Manager Fromme told employee Batt that he was considering Batt for the position of foreman, but that "this management job depended on whether or not the Union went in." Fromme added that, if Batt returned to college, the Company might rehire him provided he did not vote for the Union; but that, if the Union got in, the Company would have to lay Batt off since he was one of the employees with the least seniority. (J.A. 11-12; 55.)

The second election was conducted as scheduled, on March 5, 1965, and the Union again lost, by a vote of 128 to 119. The Union filed with the Board objections to the election and unfair labor practice

charges, alleging that the Company's pre-election conduct violated Section 8(a)(1) of the Act and required that the election be set aside. (J.A. 71, 52-53, 59; 77.) At the same time, the Union began soliciting cards from the employees authorizing it to represent them for collective bargaining purposes. By May 20, 1965, 137 out of 248 employees in an admittedly appropriate bargaining unit had signed such cards. (J.A. 65; 9-10, 11, 14, 15, 17-46, 79-84, 85-88, 91-96.)

On that date the Union advised the Company of its majority status, offered to submit its authorization cards to an unbiased check, and requested the Company to commence collective bargaining. The Company refused the Union's request, stating that it had no knowledge of the Union's claim of representation, that the Union had lost the March 5 election, and that the Union's request was untimely. (J.A. 65-66; 88.) The Union then filed a further unfair labor practice charge with the Board, alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. The proceedings on this charge were consolidated with the proceedings arising out of the Company's pre-election conduct.

B. The Decisions of the Board and Court of Appeals

Upon the foregoing facts the Board found that, prior to the second election, the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees respecting their union sympathies, threatening them with economic reprisals for supporting the Union, promising them benefits if they

did not, and announcing increased insurance benefits in a "patent attempt * * * to thwart the holding of a fair election" (J.A. 53, 54, 56, 67, 73). The Board further found that this same conduct "interfere[d] with [the] employees' freedom of choice in selecting a bargaining representative" and thus "warrant-[ed] setting aside the election" (J.A. 67). Finally, the Board held that the Company violated Section 8 (a)(5) of the Act by refusing to recognize and bargain with the Union on and after May 24, 1965. In so ruling, the Board found that the Union had theretofore obtained valid authorization cards from a majority of the employees in an admittedly appropriate unit, and that the Company's pre-election "unfair labor practices, considered in the light of [its] earlier history of union animus and unfair labor practices," established that its refusal was "not because of a good-faith doubt of the Union's majority" but was based on "a rejection of the collective bargaining principle * * * and * * * was in bad faith * * *." (J.A. 73, 65.) The Board set aside the election, and ordered the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (J.A. 68-69, 74-75).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 13-17).

ARGUMENT

The Company does not contest the finding of the Board, sustained by the court below, that immediate-

ly before the March 1965 election it committed extensive unfair labor practices, which precluded the employees from freely voting and required the setting aside of the election. Nor does it deny that shortly after the election the Union obtained valid authorization cards from a majority of the employees in an appropriate unit, and that the Company had no doubt about this fact on May 24, when it refused the Union's request for recognition and bargaining. The Company contends that it was not obligated to bargain with the Union because, in the election conducted 1½ months before, the Union failed to obtain a majority of the votes. In the circumstances of this case, the decision of the court of appeals rejecting this contention is clearly correct, and is not in conflict with any other decision. There is no occasion for further review.

1. As this Court has held, a Board conducted election and certification under Section 9(c) of the Act is not the only means by which a union may establish its majority status and right to recognition. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Accordingly, it is well settled that, when a union has obtained valid authorization cards from a majority of the employees in an appropriate bargaining unit, the employer has a duty under Section 8(a)(5) of the Act to recognize and bargain with the union, unless he has a good faith doubt about the union's majority status.[3] *Joy Silk-Mills, Inc.* v.

[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with representa-

National Labor Relations Board, 185 F. 2d 732, 741-742 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179-180 (C.A. 2), certiorari denied, 370 U.S. 919; *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774 (C.A. 3); *National Labor Relations Board* v. *Frantz and Company*, 361 F. 2d 180 (C.A. 7); *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 135-139 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209-210 (C.A. 9). Here, as the court below held (Pet. App. 16), "the Company never challenged the validity of the cards obtained by the Union between March 6 and May 20, nor did it express doubt that the cards had been signed by a majority of the unit employees." Rather, the Company's refusal to bargain with the Union on May 24, like its prior course of conduct (see *supra*, pp. 2-4), "was motivated by a desire to frustrate the employees' right to organize and bargain collectively" (Pet. App. 17). In these circumstances, the Board was amply warranted in finding that the Company had violated Section 8(a)

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tives of his employees, subject to the provisions of Section 9(a)." Section 9(a) provides in pertinent part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining * * *." As this Court pointed out in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, *supra*, 351 U.S. at 66, 74-75, authorization cards constitute sufficient designations within the meaning of Section 9(a).

(5) of the Act, and in requiring it to bargain with the Union.

2. The Company is not aided by Section 9(c)(3) of the Act, which provides: "No election shall be directed in any bargaining unit * * * within which, in the preceding twelve-month period, a valid election shall have been held." First, Section 9(c)(3) merely precludes a second election within twelve months of a prior election; it does not bar a union from establishing its majority status within the twelve months by other means. *Conren, Inc.* v. *National Labor Relations Board*, 368 F. 2d 173 (C.A. 7), certiorari denied, 386 U.S. 974. Second, Section 9(c)(3) is in any event inapplicable here, because it applies only where "a valid election shall have been held" within the twelve-month period. In the present case the March 1965 election was not valid, since the Board set it aside because of the Company's unfair labor practices.[4] It is irrelevant that, at the time the union requested recognition, the Board had not yet invalidated the election. For, as the Board correctly held, the Company's illegal efforts to subvert the election demonstrated that it refused to bargain not because it doubted that the union then represented a

[4] For this reason, the instant case is stronger than *Conren, supra*. In *Conren*, the employer was required to recognize the union on the basis of a card majority established within twelve months of a *valid* election which the union had lost.

As petitioner acknowledges (Pet. 9), there is no "direct conflict" with *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. That case involves a different problem. See the Board's brief in opposition in *Conren*, No. 1029, O.T., 1966, pp. 8-9.

majority of the employees, but because it was unwilling to bargain with the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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